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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 253.

EUGENE HIGGINS,

Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit, here brought for review, is reported in 111 F. (2d) 795; and appears in full in the printed record, at pages 243-245.

The opinion of the Board of Tax Appeals, reviewed by the Circuit Court of Appeals is reported in 39 B. T. A. at page 1005, *et seq.*; and is printed in full at pages 68 to 86 of the printed record.

The opinion of the Board of Tax Appeals contains a lengthy statement of the facts found by it, and of its legal conclusions therefrom; and its two brief orders dealing with the income tax deficiencies assessed against the petitioner for the years 1932 and 1933, respectively, are printed in the record at pages 87 and 88. The petitioner's two appeals to the Board of Tax Appeals, which brought up like question of carrying on business during the two years 1932 and 1933, were consolidated by that Board and disposed of in the one opinion.

The facts were, to a considerable extent, stipulated (R. 48-67), and as to the rest the evidence was uncontradicted (R. 109-238).

The opinion of the Circuit Court of Appeals on the consolidated cases, disposing of both the petitions for review of the orders of the Board of Tax Appeals, refers to the detailed findings of fact by the Board, briefly summarizes them, and states its decision on the questions presented.

Its order, disposing of both the petitions for review and affirming the decisions of the Board of Tax Appeals, was entered on May 22nd, 1940, and is printed in full on page 245 of the record.

Jurisdiction of This Court.

This Court has jurisdiction of the cause under the provisions of Section 240 (a) of the Judicial Code of the United States as amended by the Act of February 13th, 1925; and directed issue of certiorari, bringing the cause here for review by it, on October 14th, 1940.

Statement of the Case.

Petitioner is an American citizen, possessed of investments in New York real estate having an assessed value of over $11,000,000 (R. 135-145), and in securities consisting of stocks and bonds of a value exceeding $25,000,000 (R. 125). For the purpose of managing these investments, petitioner over forty years before the years in question (R. 71 and 76) set up a substantial business organization, ever since maintained by him, which it was costing him approximately $75,000 a year to operate (R. 50-51, 52-54).

The petitioner's real estate, with the exception of two small unimproved lots, was located in the Borough of Manhattan, New York City, and consisted of some thirty different plots on which the improvements alone were assessed at $3,466,000 (R. 118, 135-145). His securities were kept in safe deposit boxes in New York City (R. 121-122). Petitioner had for many years resided at Paris, France, where he personally conducted his affairs and directed all details of the operation of his organization (R. 119-120, 125-126, 129, 148-199).

All details of petitioner's financial affairs were conducted through his New York office pursuant to his personal detailed instructions. His income consisted of rents, dividends and interest, all paid to him at his New York office (R. 123).

In Paris, he had an office, in a building separate from his dwelling, consisting of several rooms equipped with cabinets, desks, typewriters and a library in charge of his private secretary (R. 114, 120, 127). Duplicate sets of his New York books of account were kept there (R. 128, 129).

In New York City he rented a suite of four offices staffed with a manager, a real estate man, an accountant, one consultant, and a clerk-stenographer (R. 114). This entire staff of the petitioner consisted of salaried employees whose time (with the exception of that of one employee whose activities were practically confined to the real estate), was indiscriminately given to the management of the taxpayer's real estate and to the management of his investments in securities (R. 70-78).

The taxpayer had organized this method of conducting his affairs in 1889 (R. 76), and even the routine of its administration under the petitioner's orders had been carried on without substantial change since about 1902 (R. 71).

In 1932 the petitioner personally selected and purchased $675,000 of new securities, and in 1933 $1,052,000 of new securities (R. 73).

The evidence to the constant personal management and control and personal direction by the petitioner of all his investments is full and uncontradicted and is largely sustained by the finding that he was in practically daily communication by cable, radio and mail with his New York office (R. 69-78). The character of his personal investigation and decisions as to his investments in securities appears in Exhibit 5 (R. 148-199); and these documents were unquestioned.

It was undisputed that the expenses which he claimed as a deduction from his gross income were ordinary and necessary. The Commissioner, in fact, before the matter came before the Board of Tax Appeals, held that all the expenses for which the petitioner claimed a deduction from his gross

income were ordinary and necessary expenses of his business of managing his own estate, but disallowed a percentage of them, on the ground that a corresponding percentage of the taxpayer's gross income was derived from tax-exempt securities, such as United States and State bonds; holding that the total expenses incurred should be prorated according to the amount of income derived respectively from exempt and non-exempt sources, disallowing the same percentage of the expenses as the non-taxable gross income bore to the petitioner's total gross income (R. 21).

This theory proving untenable (R. 84), the Commissioner asserted for the first time, before the Board of Tax Appeals, the theory (sustained alike in this case by the Board of Tax Appeals and by the Circuit Court of Appeals), that, while in managing his real estate investments the petitioner admittedly was carrying on business, in the associated active management of his own investments in securities, in the same offices and with the services of his same staff of salaried employees, he was not carrying on business (R. 83-84, 244).

The method of disposing of the question by allowing a percentage of the total expenses paid, on the ground that that percentage pertained to the management of the petitioner's real estate, and disallowing a percentage of them, on the sole ground that that percentage of them pertained to the management of his securities, involved the determination that all the expenses so divided were ordinary and necessary.

The items in dispute appear in detail by a comparison of the part of the opinion of the Board of Tax Appeals appearing on pages 85 to 86 of the Record, with the part of the

stipulation of facts before that Board appearing on pages 49 to 54 of the Record.

The items here in question, which were disallowed as deductions on the sole ground that the taxpayer in managing his securities was not carrying on business, were:

For the year 1932	$20,270.89 and
For the year 1933	$16,087.44

No question is made for either year over the disallowance of certain small items for services and disbursements with respect to admittedly personal matters, amounting in 1932 to $2,613.04 and in 1933 to $1,127.75.

In each year a part of the taxpayer's income exceeding the amount of the respective deductions so denied was taxed at the rate of fifty-eight per cent, so that the amount of taxes assessed and directly involved in this case is:

For 1932	$11,757.12
For 1933	$ 9,330.72

The facts that, in so far as concerned the management of his holdings of real estate, the petitioner was carrying on business within the meaning of the Act, and that all the expenses thereof claimed were ordinary and necessary, was admitted by the Commissioner and specifically held by the Board of Tax Appeals (R. 84). No question was made of that holding of the Board before the Circuit Court of Appeals (R. 244). And in a subsequent case that Court has held that similar management of large holdings of real estate was carrying on business.

Pinchot v. *Commissioner*, 113 F. (2d) 718.

The Board of Tax Appeals and the Circuit Court of Appeals supported the Commissioner in drawing a distinction between the expenses of the petitioner's management of his real estate, and those of his management of his investments in securities, and allowed a percentage of about two-thirds of his annual expenses as attributable to his business of managing his real estate, and decided that the other one-third of the same expenses in each year must be attributed to the ordinary and necessary cost of management of his securities; and that for so much of the expenses of the business so conducted by him as pertained to the management of the investments in securities he should not be allowed a deduction, solely because of the nature of such investments (R. 84, 244); and this although the management under him of his entire estate, real and personal had been conducted in common without modification of the system, by a single staff of salaried employees for over thirty years, of which period ten years were prior to the enactment of the Revenue Act of 1913.

The apportionment of the expenses (excepting the salary of a single employee whose time was practically entirely devoted to the real estate and whose entire salary was allowed as a deduction), was not based upon any positive evidence, but was estimated by the Board of Tax Appeals on the basis of the approximate amount of time estimated as given by his employees to the real estate and to the securities respectively.

No question is here raised as to the mere correctness of the ratio so used in apportioning the expenses, if they could be apportioned by what was essentially a guess. That it was such a guess is apparent on the face of the opinion of

the Board of Tax Appeals (R. 68-86) and throughout the evidence (R. 109-238). No such actual division of the expenses of carrying on the business in rented offices by salaried employees was made in the daily operation of the taxpayer's business (R. 125).

The case presented is not one of the taxpayer's letting others run his affairs, simply sitting back and merely receiving income from a capital managed by others. It is one of direct personal management of all his affairs, the taxpayer himself making every decision, giving constant and practically daily attention to all its details, which were all controlled by him personally; though, owing to the magnitude and multiplicity of his affairs, he required the services of salaried assistants, who worked subject to his orders and to his constant personal supervision.

That, in this case, managing investments in securities amounting to upwards of twenty-five million dollars attained the dimensions, regularity and continuity of carrying on business, is clearly established by the determination that the share of the ordinary and necessary annual office rents, expenses and salaries of employees applicable to the management of these investments in securities (for which share of the rents, expenses and salaries paid by the petitioner deduction has been denied) amounted in one of the two years under consideration to over $20,000, and in the other to over $16,000 (R. 50-54, 85-86, 87, 88).

The Commissioner (after shifting his position before the Board), the Board of Tax Appeals and the Court below have each taken the position that, while his management and care of his real estate was carrying on business, his like management and care of his securities carried on in

the same offices and with the assistance of the same staff of clerks, though attaining such magnitude and having the petitioner's constant personal attention and decision, was not "carrying on business".

They accordingly have divided the expenses of operating his offices, consisting of salaries, rentals and miscellaneous general expenses, attributing two-thirds of these disbursements (and the entire salary of one assistant whose work was practically exclusively on real estate matters) to the management of the real estate, and the remaining one-third (other than the one man's salary) to the management of the investment in securities, allowing the two-thirds as a proper deduction, but refusing to allow as a deduction the one-third of these same expenses which one-third the Commissioner, the Board and the Court below have alike deemed to be attributable to the petitioner's active management of his investments in securities, disregarding completely the fact that such expenses were part of the cost of that part of his income, even if he were not carrying on business in that respect.

Questions Presented.

The main question presented is: whether the owner of some twenty-five million dollars of securities as well as some eleven million dollars worth of real estate (nearly all improved) who personally, with the assistance of a staff of salaried employees ever since 1902 and during the two years involved, 1932 and 1933, has been actively managing his vast estate, and who, admittedly, was engaged in carrying on business in so far as concerned the

management of his real estate, was also, as far as concerned the concurrent management of his securities in the same offices and by the same salaried employees, engaged in "carrying on business" within the meaning of the Revenue Law of 1932; where the entire management of all his estate was conducted by him as an entity, through the same offices and the same staff of salaried employees, under his own constant almost daily supervision and direction (R. 72), and with no differentiation made in the management of these affairs between time spent by his employees in connection with the management of one part of his property or the other, save as a single one of his staff (Dietz) was actually occupied, practically exclusively, with real estate matters, and full deduction of his (Dietz) salary accordingly allowed.

A second question presented is whether, on an estimate of how much of the time of the petitioner's staff was spent in connection with the management of the real property and how much in connection with the management of the securities, the statute authorizes division of the expenses (concededly ordinary and necessary and paid during the taxable year) in the management of his great property, which for over 30 years had been conducted as a single entire business; and says that the petitioner's management of the real estate was carrying on business, and his concurrent management of his securities by the same staff in the same offices, and all under the petitioner's constant personal direction, was not carrying on business; allowing the amount of those expenses deemed to pertain to the management of the real estate as a proper deduction, and refusing any deduction for the percentage of the

same expenses deemed incurred in the concurrent management of his securities?

The main question presented simmers down to the precise meaning of the words "carrying on any trade or business", as used in Section 23, (a) of the Revenue Act of 1932.

It can hardly be questioned that if the management of this vast property had been farmed out to a third person that management would constitute the carrying on of "business" by such third person and he would be entitled to deduct his own necessary and ordinary expenses of conducting it from his own income.

Wallace's Estate v. *Commissioner,* 101 Fed. (2d) 604.

Does the statute authorize a differentiation, as matter of law, either between different individuals conducting such business for profit, or between the kinds of property handled by the taxpayer in managing his own affairs?

Both these differentiations have been made in the case at bar in the decision below, and they are each essential to sustaining that decision.

Statutes Involved.

The only statute directly involved is Section 23, and its Subdivision (a) of the Revenue Act of 1932 (Act of June 6, 1932, Cap. 209, Sect. 23, (a) 47 Stat. at Large) which reads as follows:

"In computing net income there shall be allowed as deductions:

"(a) Expenses. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; travelling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

This Section, as far as concerns the questions here presented, has been unchanged in substance since 1913. What slight changes there have been have grown little by little out of the provisions of Section II, B. of the Revenue Act of 1913. The text of the corresponding sections of the successive acts will be found in the Appendix to this brief.

Specifications of Errors Urged.

The Circuit Court of Appeals erred:

1. In disallowing the claim of petitioner for deduction from his gross income of the ordinary and necessary expenses found to have been paid by him in connection with his active personal management of his holdings of securities and new investments therein (R. 244, 245).

2. In holding that petitioner in his personal management of his various investments in real estate and in securities was not carrying on an entire business and that

the petitioner was therefore not entitled to deduct from his gross income all the ordinary and necessary expenses of the entire business so conducted by him paid by him during the year (R. 243-245).

3. In holding that, where the petitioner personally managed his entire estate, consisting partly of real estate and partly of investments in securities, all as a single unit, through regular offices maintained by him, and with the aid of a staff of salaried employees and giving that business practically daily personal attention, and having his finger on every piece of business (R. 72), the Revenue Law authorizes a segregation of the actual ordinary and necessary expenses of his conduct of those affairs, between those deemed incurred in the management of his real estate and those deemed incurred in the management of his investments in securities, allowing the former as expenses paid in carrying on business, and disallowing the latter as a deduction as not having been paid in carrying on business (R. 244-245).

4. In holding that the ordinary and necessary expenses paid by the petitioner in his personal care and management of his investments in securities, under the undisputed circumstances shown by the record, were not expenses of a business carried on by him (R. 244, 245).

5. In holding that: "By the common speech of men, a person who does nothing beyond looking after his own investments and receiving the income from them is not conducting a trade or business. He is generally spoken of as 'retired' or 'not in business'. It is forcing the ordinary meaning of words to say that conserving or

enhancing one's estate is carrying on a trade or business" (R. 244).

6. In holding that "the attention which the petitioner "gave to his investments in stocks and bonds did not amount to carrying on a trade or business, and that expenses paid in caring for such investments were not deductible from gross income" (R. 244).

7. In affirming the two decisions of the Board of Tax Appeals disallowing in each year the deduction of such part of petitioner's expenses of his business as it had held to be applicable to the management of his investments in securities (R. 244-245).

Summary of the Argument.

1. The rulings assigned as error are rulings of law.

2. Prior varying decisions of the question here presented have been decisions of the fact whether the taxpayer's activities in the particular case in connection with his management of his securities were so continuous, extensive, varied and regular as to amount to carrying on business.

The decision of the Court below at bar has rejected that test, and holds that no taxpayer can be held to be carrying on business in managing his own investments in securities, however extensive, continuous and regular his activities may have been.

3. The management of this petitioner's entire great estate constituted a single business within the meaning of the Revenue Act.

4. The true definition of the word "business" in the Act is that given to that word by this Court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, two years before the original passage of the Revenue Act.

5. Section 23(a) itself distinguishes between expenses of isolated business transactions and expenses of like transactions incurred in "carrying on a business".

6. The Act authorizes no distinction among the persons who carry on a business of managing a great mass of securities between persons who manage securities belonging to others and persons who carry on the business of managing their own securities.

7. The Act does not authorize severance of a legitimate entire business by the Revenue authorities and rejection of part of the ordinary and necessary expenses thereof paid during the year.

8. The ordinary and popular meaning of "any trade or business" is broad enough to include the management of one's own securities if that management involves the elements of constant attention and care instead of merely isolated transactions.

9. The administration of the Revenue Act in accordance with our contentions for twenty years and more

during which this provision has been substantially repeatedly reenacted makes applicable the rule declared by the Court in *Helvering* v. *Winmill*, 305 U. S. 79, 83, that, "Treasury regulations and interpretations long continued without substantial change applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law".

POINTS AND AUTHORITIES.

I.

The rulings assigned as error and here sought to be reviewed are rulings of law.

Where, as here the evidentiary facts as to the taxpayer's activities and the nature thereof are undisputed, the conclusion that the activities shown do, or do not, amount to "carrying on business" involves a construction of the Section and a conclusion of law that is reviewable by the courts.

Cecil v. *Commissioner*, 100 F. (2d) 896, 900;
Washburn v. *Commissioner*, 51 F. (2d) 949, 951.

A. The Ruling of the Board of Tax Appeals.

The Board of Tax Appeals also stated, in substance, that its conclusion was not based on any determination of the extent of the activities of the petitioner in connection with his holdings of securities or of their regularity or conti-

nuity. It followed an entirely different proposition of law, when it said:

> "To allow the deductions claimed in the present proceeding and to disallow them as was done in *Kane* v. *Commissioner, supra*, would be to make a distinction between the small investor and one investing like the petitioner upon a very large scale, for the nature of the expenses disallowed by the Commissioner is the same in both cases. We cannot make distinctions merely because of the extent of investments or of expenses commensurate therewith" (R. 83).

That was, in substance, a refusal to pass on the question whether the activities of the taxpayer in relation to his investments in securities were so regular, continuous and active as to constitute "carrying on business"; and a determination that, because the expenses of this taxpayer in connection with his securities were of the same general character as a might be the merely occasional ones of a small investor in securities, whose activities were isolated and occasional only, the present taxpayer, as matter of law, cannot be engaged in "carrying on any business" though his activities have every characteristic of a regular business and have been conducted on the large scale shown ever since 1902.

Section 23(a) distinctly says that ordinary and necessary expenses are to be allowed as deductions when they are expenses of "carrying on business", and does not allow deduction of identical expenses without other proof that they are part of the cost of specific items of income, when they are not expenses of "carrying on business."

That makes the precise distinction between the small investor having only occasional isolated matters to attend to, and the investor whose activities are on so large a scale that they require continual attention and daily care, so constant and continuous that they become the "carrying on of business."

Where the transactions are isolated or sporadic the proofs must show, pursuant to the established procedure of the Bureau, that the particular expenses for which credit is sought were part of the ordinary and necessary cost of securing particular items of income reported.

I. T. 2751, XIII-1 C. B. 43;
1934 C. C. H. Fed. Tax Service, Vol. 3, Sec. 6035.

The section itself recognizes that expenses of the same general nature may be established in the case of "carrying on business" by general proof that they are the "ordinary and necessary expenses paid or incurred during the taxable year" in carrying on that business.

It is the multiplicity of recurrent items and the continuous, regular and active attention required that make the difference between having occasional isolated transactions of a business nature, the expenses of which are not allowed as deductions under this section without further proof, and "carrying on business" the ordinary and necessary expenses of which are to be allowed as a deduction by the express terms of this section, without additional proof.

The real explanation of the distinction made by Section 23 (a) is probably this:

In cases of isolated transactions of income reported, the taxpayer is required to make proof of the cost of securing each of those particular items, and such costs are allowed upon the production of such proofs.

I. T. 2751, XIII C. B. 43.

But in the case of a taxpayer having such a multiplicity and continuity of transactions as to constitute carrying on business, the preservation and production of such proofs would not only impose a great expense on the taxpayer but it would also impose a heavy burden on the officials of the Revenue Bureau, who would be required to check each such item independently. Under those circumstances, Congress provided the common-sense rule that, where the transactions were so numerous and continuous that they constituted carrying on a trade or business, all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on such trade or business might be proven annually in lump form, so relieving not only the taxpayer but also the officials of the Revenue Bureau of a great burden of labor.

The Board's ruling was thus erroneous in law.

B. The Ruling of the Circuit Court of Appeals.

The Circuit Court of Appeals said in this case:

> "By the common speech of men, a person who does nothing beyond looking after his own investments and receiving the income from them is not conducting a trade or business. He is generally spoken of as

> 'retired' or 'not in business.' It is forcing the ordinary meaning of words to say that conserving or enhancing one's estate is carrying on a trade or business" (R. 244).

And it again indicated that its determination was based on the conclusion of law that a taxpayer could not be "carrying on business" in managing his investments in securities, no matter how extensive, constant or regular his activities were in connection therewith, when it said:

> "The result we have reached is not to be reconciled with *Kales* v. *Commissioner,* 101 F. (2d) 35 (6th Circuit)" (R. 244).

That remark could properly be made only if it were recognized that a different rule of law was being adopted in the case at bar from that adopted in *Kales* v. *Commissioner.* Different conclusions of fact in different cases on differing evidence are not themselves irreconcilable. It is only a difference in the law applied to the facts that makes two decisions irreconcilable.

About two months after its decision in the case at bar, the Circuit Court of Appeals for the Second Circuit, in a subsequent case, held that the active management of one's own real estate on a large scale was "carrying on business" within the Revenue Act, citing the definition of business by this Court in *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, in support of its ruling, and adding:

> "Our decision in Higgins v. Commissioner, 2 Cir. 111 F. (2d) 796, did not touch the question of real estate management as a business."

Pinchot v. *Commissioner,* 113 F. (2d) 718, 719.

The decisions below, both of the Board of Tax Appeals and of the Circuit Court of Appeals, further involve the ruling that the Board may differentiate between activities of a taxpayer on the ground of the nature of the investments which he has, holding that if these investments are in securities their management, though taking equally constant time, attention and activity and involving equal expense, cannot be deemed "carrying on business", though the like activities and like expenses in managing real estate owned by the taxpayer will be deemed "carrying on business"; thus differentiating between kinds of property managed by the taxpayer.

We find no provision in the statute authorizing any such distinction between kinds of investments.

Both the ruling of the Board and the ruling of the Circuit Court of Appeals also involve holding that the Commissioner and the Board and the Courts are permitted to differentiate between individuals conducting like activities for profit, on the ground that what is "carrying on business" in the case of a person who handles another's securities, is not "carrying on business" in the case of the person who owns the securities which he handles. We find no provision for such a distinction between persons in the statute. We discuss this proposition below under Point VI.

Both these differentiations have been made in the case at bar and both are essential to the decisions reached below.

II.

Prior decisions have been that whether a taxpayer in managing his own securities was carrying on business was a question of fact to be determined on the basis of whether the taxpayer's activities were continuous, extensive, varied, and regular.

The decision now under review practically rejects that doctrine, and, in substance, holds that, totally irrespective of such tests, as a matter of law, no taxpayer can be held to be carrying on business in managing his own investments in securities, however extensive, continuous and regular his activities may have been.

A distinction was long ago drawn between cases where the taxpayer actually carried on the business of managing his estate, and cases where the taxpayer did not (either personally or by employee or agent) take any active part in its management, but farmed out that work, so that the mere receipt of income from securities, in the absence of such continued management, was held, as matter of fact, not to constitute a carrying on of business by the taxpayer.

There followed accordingly a series of rulings, both by the Board of Tax Appeals and by the courts, passing on the question whether the activities of a particular taxpayer in handling his securities were so continuous, extensive, varied and regular as to sustain, as matter of fact, the contention that the taxpayer was actually engaged in carrying on business in managing his securities.

Schwinn v. *Commissioner*, 9 B. T. A. 1304;
Alverson v. *Commissioner*, 35 B. T. A. 482;
Bachofen von Echt v. *Commissioner*, 21 B. T. A. 702, reversed on rehearing, 27 B. T. A. 1419;
Croker v. *Commissioner*, 27 B. T. A. 588, 592;
Kissel v. *Commissioner*, 15 B. T. A. 1270;
Barney v. *Commissioner*, 36 B. T. A. 446;
Miller v. *Commissioner*, 102 F. (2d) 476, 479;
Kales v. *Commissioner*, 101 F. (2d) 35, 39;
Kane v. *Commissioner*, 100 F. (2d) 382;
Rogers v. *United States*, 41 F. (2d) 865;
Walker v. *Commissioner*, 63 F. (2d) 351;
Stephenson v. *Commissioner*, 101 F. (2d) 33.

And as suggesting the same rule, Circuit Courts of Appeal have also cited the following decisions of this Court as tending to support the same doctrine.

Dalton v. *Bowers*, 287 U. S. 404;
Burnet v. *Clark*, 287 U. S. 410.

The four most recent decisions of the Circuit Courts of Appeals rendered prior to the one at bar on this subject are: the *Heilbroner* case, 34 B. T. A. 1200, affirmed under the title of *Kane* v. *Commissioner*, 100 F. (2d) 382; the *Kales* case, 101 F. (2d) 35; the *Miller* case, 102 F. (2d) 479; and *DuPont* v. *Deputy*, 103 F. (2d) 257.

In the *Heilbroner* case, the Board of Tax Appeals held:

> "The evidence shows that petitioner was a widow who, upon her husband's death, received a substantial estate, mostly in securities. She had no business experience. She placed some of her securities

with a trust company to collect the income, and paid the trust company $583.13 as its charge or commission for such service. Her brother had an individual office and a secretary or bookkeeper. Petitioner's accounts and affairs were to some extent looked after by this secretary, and, by arrangement with her brother, petitioner paid $1,200 as her proper share of the secretary's compensation and the office rent. This she deducted on her return, and the Commissioner disallowed the deduction.

* * * * * *

"Petitioner was not carrying on any trade or business. Even the 'very comprehensive term' referred to in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, does not reach her for, as shown by this evidence, there was nothing about which petitioner was employed and nothing that occupied her time, attention, or labor for livelihood or profit. She did not manage her estate or direct its management. She merely received income from investments, and this is not a trade or business."

34 B. T. A. 1201.

This decision of the Board of Tax Appeals was sustained by the Circuit Court of Appeals for the Second Circuit in the case of *Kane* v. *Commissioner* (Mrs. Kane being the former Mrs. Heilbroner), the Circuit Court of Appeals saying:

"While we do not say that the taxpayer might not carry on a business through an agent, it was not shown here that enough was done either by the taxpayer or her agents to constitute the carrying on of a business. * * * The activities of the taxpayer's brother as to her investments and the employment for personal convenience of a bookkeeper to record financial transactions, or of a bank to cut

and collect coupons, did not, in our opinion, amount to the carrying on of a business."

Kane v. *Commissioner,* 100 F. (2d) 382, 383.

In that case both the Board of Tax Appeals and the Circuit Court of Appeals proceeded on the theory that whether the activities of the taxpayer in regard to management of her own securities were so great and so continuous as to amount to her carrying on business, was a question of fact, and not a question of law as to the nature of her investments; and in that case they resolved that question of fact against the taxpayer.

The second case was that of *Kales.*

In the *Kales* case, the Board of Tax Appeals wrote:

> "The instant case is similar to the *Kissel* case in two respects. Here, as there, the taxpayer is a woman of substantial means and, as in that case, one of the questions involved is whether her activities in connection with the use of her property constituted the carrying on of a trade or business within the meaning of section 23 (a), *supra.* In the *Kissel* case, we were satisfied from the evidence and the testimony of record that the activities of the taxpayer were such as to constitute the conduct of a trade or business within the meaning of the statute. It is thus apparent that even under the theory of the *Kissel* case the deductibility of the fees in the instant case is dependent upon a determination that the activities of this petitioner in respect of the income involved in the refund suits constituted the conduct of a trade or business.
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> * * * * * *
>
> "In the instant case there is no showing that the petitioner associated herself actively in any of the

> enterprises in which she held securities or that she devoted any of her time to the work of those enterprises as a matter of business or in any way other than in the collection of whatever dividends or interest might be due or owing on the securities held. * * * * Her only activity shown by the record was the receipt of dividends paid. * * * She stated from the witness stand that she knew nothing about bonds, but gave her approval to the lists of securities submitted by her attorneys. The only other activity in this connection so far as the record shows, was a request that in so far as possible, the bonds be purchased through a firm with which her niece's husband was connected."
>
> *Kales* v. *Commissioner,* 34 B. T. A. 1046, 1054, 1055.

One member of the Board had dissented, he "being of opinion that petitioner's activity in the premises was such as to constitute a trade or business," ibid, pp. 1058-1059.

That decision of the Board was reversed by the Circuit Court of Appeals for the Sixth Circuit in 101 F. (2d) 35, where the Court said:

> "Concluding that there are cases where the activities of taxpayers are such that though they invest but their own capital they are none the less carrying on a business, we think that Mrs. Kales' activities bring her deductions within the permissible scope of the statute. While the petitioner's endeavor to make proof of her activities during the earlier years of the period 1916 to 1930 was somewhat curtailed by the view of the examining board member that, since the questions related to expenses for the years 1928 and 1930, activities of those years only

were important, there is sufficient evidence in the record, however, and quite enough likewise in the evidentiary findings of the Board, to show her general activity in relation to her affairs during the entire period. She had an arrangement with her lawyers by which her books were kept by the firm's head bookkeeper, first with one assistant and later with two. For this service she paid the firm $3,000 a year. She visited the office set aside for her to confer with the bookkeeper three or four times a week, signed all checks personally, except when absent from the city, and made all decisions affecting either her sale or purchase of securities. * * * It would be impossible in the brief space of an opinion and serve no useful purpose to detail all her activities. It is sufficient to say that they were extensive, varied, continuous and regular, and in no substantial manner to be distinguished from the activities of the taxpayer in the Kissel and von Echt Cases, and in that of Bula E. Croker v. Commissioner, 27 B. T. A. 588, cited by the dissenting Board member."

Kales v. *Commissioner,* 101 F.(2d) 35, 39.

It is to be noted that the decision of the Circuit Court of Appeals in the *Kales* case is again based on the determination as matter of fact of the question whether the activities of the taxpayer were so "extensive, varied, continuous and regular" as to amount to her carrying on business in respect to her management of her own securities.

The third important case of the same character is that of *Miller* v. *Commissioner,* 102 F. (2d) 476, where the Circuit Court of Appeals for the Ninth Circuit ruled:

"Other cases have recognized that though the taxpayer takes no part in the enterprises as to which

he is an investor, he may nonetheless be considered to be carrying on a business if the transactions concerning his investments are substantial and frequent as distinguished from occasional or isolated. Dalton v. Bowers, 287 U. S. 404, 53 S. Ct. 205, 77 L. Ed. 389; Burnet v. Clark, 287 U. S. 410, 53 S. Ct. 207, 77 L. Ed. 397; Rogers v. U. S., Ct. Cl., 1930, 41 F. 2d 865; Walker v. Commissioner, 3 Cir. 1933, 63 F. 2d 351, affirming 20 B. T. A. 937; Stephenson v. Commissioner, 6 Cir., 101 F. 2d 33, January 11, 1939; Schwinn v. Commissioner, 9 B. T. A. 1304; Kissel v. Commissioner, 15 B. T. A. 1270; Bachofen von Echt v. Commissioner, 21 B. T. A. 702; Alverson v. Commissioner, 35 B. T. A. 482; Barney v. Commissioner, 36 B. T. A. 446. In addition to the cases cited, two Circuit Court cases have very recently been decided which applied, in ascertaining the character of the taxpayer's investment activities, the test of the extent of those activities. We think that these two cases, taken together, establish a proper measure for the determination of whether a taxpayer's activities are of a 'business' character."

Miller v. *Commissioner*, 102 F. (2d) 476, 479.

In the case of *Du Pont* v. *Deputy*, 103 F. (2d) 257, the Circuit Court of Appeals for the Third Circuit held that the activities of the taxpayer in regard to securities owned by him were such as to constitute carrying on business.

This Court, on writ of certiorari, reversed the decision in that case on the ground that the particular expenses involved were not ordinary and necessary; the majority of this Court holding that it was unnecessary in that case to determine whether the activities of the taxpayer amounted to carrying on business or not.

Justices FRANKFURTER and REED, however, held, in a concurring opinion, that they did not amount to carrying on business (308 U. S. 499); while Justices ROBERTS and MCREYNOLDS held, in a dissenting opinion (308 U. S. 502), that they did amount to carrying on business.

During the period prior to 1939, there had been other cases proceeding on the same question of fact as to the extent and continuity of the taxpayer's activities in managing his securities. It had always until the present case been regarded as a question of fact to be determined on that basis.

If the unquestioned activities of the petitioner in the present case in regard to his investments in securities in conjunction with his real estate did not amount to carrying on business, what is the element lacking that could exist?

In the present case, when the opinion below is analyzed, the proposition was held by the Court below to be one of law: That no amount of continuous activities on the part of the taxpayer relating to securities he owns, can amount to "carrying on business."

The Circuit Court of Appeals in the opinion at bar refers to its own decision in the *Kane* case and also to the decision of the Circuit Court of Appeals for the Ninth Circuit in *Miller* v. *Commissioner,* 102 F. (2d) 476, as supporting its present ruling.

Neither of these cases seems to us either to sustain or proceed on the proposition of law advanced below in the case at bar.

Each of those two former decisions proceeded expressly on a determination of *fact* that the activities of the tax-

payer in the particular case were not, in fact, so extensive and continuous as to amount to carrying on business; while, either expressly or in substance, admitting that activities involved in managing one's own securities might amount to "carrying on business" if the transactions concerning investments were substantial, regular and frequent as distinguished from occasional or isolated.

As we have pointed out under Point I, the ruling of the Circuit Court of Appeals in the case at bar proceeds on the theory that managing one's own securities can not be "carrying on business" no matter how regular, frequent, substantial and continuous the taxpayer's activities are. (See Point I, *supra.*)

The Circuit Court of Appeals in the case at bar said further:

> "By the common speech of men, a person who does nothing beyond looking after his own investments and receiving the income from them is not conducting a trade or business. He is generally spoken of as 'retired' or 'not in business.' It is forcing the ordinary meaning of words to say that conserving or enhancing one's estate is carrying on a trade or business" (R. 244).

Other tribunals have held a different view.

> *Croker* v. *Commissioner,* 27 B. T. A. 588, 592; id. XII-1 C. B. 4;
> *Pyne et al. Executors* v. *United States,* 35 Fed. Suppt. 81.

If a man held only one long term security which needed no attention save cutting off a single coupon twice a year

and depositing it, and he had given up his former activities in some other line of business to retire and live on his savings, one might naturally speak of him as "retired." His activities in such case would have none of the recognized characteristics of "carrying on business," there being no extensive, various, continuous or regular activity, while the personal activities which had earlier been his business had been abandoned.

That is not the case here. In this case the taxpayer had been carrying on, ever since 1889, for over forty years before the years here involved, this business of managing his own great estate, giving to it his personal constant attention (R. 71-72), making all decisions about his investments (R. 72), and since 1902 (R. 71), had been carrying it on without even material change in the details of his system, and in daily communication with his New York office by letter, by cable and by radio (R. 72).

In 1932 he selected and purchased securities to the amount of $675,000 (R. 73). In 1933 he selected and purchased securities to the extent of $1,052,000 (R. 73). And the selection of the securities and the decision to make the purchase had in every instance been his own (Exh. 51, R. 148-199).

A man who has been actively personally managing a great fortune successfully in that way for a period of over fifty years continuously, is hardly to be spoken of as having been "retired" or "not in business" during all those years. When had he retired? And from what had he retired? There is not a suggestion in the record of any diminution of the activities in which he had been engaged since 1889, or of any different activities prior to that date.

Any person managing so extensive a fund as a farmer for the owner of such an amount of securities would be said to be quite actively engaged in business. Some of us, as executors or trustees, have had the management of large funds and know what such management requires; and that success in that business can be attained only by constant care and attention.

The decision below is not to be sustained by rulings that are in conflict with the terms of the Revenue Act, which by its provision for deduction of the expenses of "any trade or business" carried on by the taxpayer, forbids any discrimination because the property the taxpayer is managing is his own; and likewise, by saying "any business," forbids any discrimination based on the particular nature of the investments he is engaged in managing, whether in realty or personalty.

If any such differentiation is to be made it should be by amendment of the Act and not by attempting to read into the Act provisions that are not there, and which are in contravention of the broad words of the Act itself—"any trade or business."

Since the decision below, now under consideration, there have been three decisions bearing more or less directly on some of the questions here presented.

The first of these was the decision of the Circuit Court of Appeals for the Second Circuit in *City Bank Farmers Trust Company* v. *Commissioner*, 112 F. (2d) 457. The City Bank in that case, as Trustee of trusts under the will of Angier B. Duke, deceased, for the benefit respectively of A. N. Duke and Angier B. Duke, Jr., sought a deter-

mination of over-assessment of income taxes for 1931, because in that year it had paid itself commissions on capital as Trustee, which it had failed to deduct in making its return of the income of the beneficiaries of its trusts. Its commissions for receiving and paying out income had been previously allowed.

That case proceeded chiefly on the proposition that while the Trust Company was itself carrying on a business in administering the trusts, and, in computing its individual income taxes, could properly claim deductions for its ordinary and necessary expenditures in administering the trusts, it could not *as a trustee* be carrying on business, and the beneficiaries of the trust were not carrying on business because *they* were merely passive recipients of income.

The second of these cases, decided October 7, 1940, is the case of *Pyne et al., Executors* v. *United States*, 35 Fed. Supp't. 81. This was a case before the United States Court of Claims in the decision of which the four judges of that Court concurred.

In that case, the estate was one of approximately thirty-five million dollars. The executors, as the Court found, had powers in the administration of the estate to an extent almost equal to that of the decedent during his lifetime.

The testator died shortly before the Stock Market crash of 1929 and the subsequent depression. The executors maintained an office and employed a manager and six or seven other employees. The value of the investments of the estate so greatly declined before the estate was fully administered that the attorney testified: "It looked like

the estate was almost going to be wiped out." Only one of the executors "had had any practical business experience and his had not been of a sort to enable him to cope with the Herculean task of conserving this $35,000,000 estate in these cataclysmic times."

The claim presented was for the deduction of certain attorney's fees paid in 1934 from the income of that year.

> "The attorney's services consisted chiefly in advising the executors on steps to be taken which would best conserve the estate, as to what investments to dispose of, and in what other property to invest the proceeds, in advising the management of the corporations in which the estate had investments as to the steps to be taken to conserve their property and escape loss. In doing so, certainly this attorney was engaged in business, and we have no doubt the executors were likewise engaged in business, in the business of conserving the estate and protecting its income."

The deduction was allowed by the Court.

Pyne et al. Executors v. *United States*, 35 Fed. Supp't. 81.

The third decision was that in *Trustees of Carl H. White, deceased,* v. *Commissioner,* decided by the Circuit Court of Appeals for the Third Circuit on October 9, 1940. , Fed. (2d)

In that case the Court wrote:

> "It seems now to be clear that the investing and reinvesting of assets, either by an individual for himself or by trustees on behalf of a trust estate, is

> pretty definitely determined not to constitute the carrying on of business."

In asserting that proposition, that Court seems not only to have made a rather incomplete examination of the authorities, but also to have fallen into the same confusion of thought which we have already pointed out in the decision now under review, between, on the one hand, cases holding merely that the limited particular facts in a given case did not establish the carrying on of business, and, on the other hand, the rule adopted in the case at bar, that, *as matter of law,* the management of securities cannot under any circumstances amount to carrying on business; for the Court cites *Miller* v. *Commissioner,* 102 F. (2d) 476; *Kane* v. *Commissioner,* 100 F. (2d) 382, and of the *Kales* case says merely: "It seems to look the other way."

As we have already pointed out, neither the *Miller* case nor the *Kane* case sustains any such proposition of law, but each of them proceeds on the finding of fact that the activities shown in the particular case did not have the necessary continuity, etc., required to amuont to carrying on business.

Kales v. *Commissioner,* 101 F. (2d) 35, had also followed the rule that it was a question of fact, reaching, on the facts shown in that case, the conclusion that what was shown did amount to carrying on business.

The Third Circuit Court also cited *Bedell* v. *Commissioner,* 30 F. (2d) 622. That case very clearly went off on the decision of fact that the taxpayer in question, whatever might have been the case in other years, was not conducting any business of the kind he claimed during the year there in question.

In its opinion in the *White* case, the Circuit Court of Appeals for the Third Circuit also cited the present case and *City Bank* v. *Commissioner,* 112 F. (2d) 457, which we have just mentioned.

The Third Circuit Court, in the *White* case (with a completely changed personnel), made no reference whatever to its own previous decision in *Du Pont* v. *Deputy,* 103 F. (2d) 257, where all the Judges of that Court had held that "the plaintiff's business was primarily that of conserving and enhancing his estate," as had also been found as a fact by the District Court. The *Du Pont* case, of course, subsequently came to this Court, and while four of the Justices here gave divergent opinions on the question whether Mr. Du Pont was engaged in carrying on business, the Court itself left untouched that finding of the Courts below.

No one of those three cases had presented such a question as is here presented, where the taxpayer had, for many years before the adoption of the income tax amendment and the enactment of the 1913 Revenue Act, as well as ever since, carried on his present business of conserving and managing his own estate, and protecting its income, an estate consisting of large amounts of real estate and large amounts of securities owned by him, as a single entire business; recognized by the term "any business" in the Act, adopted while his "business" was and for many years had been active; and where he admittedly was engaged in carrying on business; but the decision arbitrarily divides his single business of managing his estate into two, holding that so much of the expenses of that business which the Court attributed to the management of his securities

could not be deducted as expenses of carrying on a business, even though they were obviously costs incurred by him in realizing the income from those securities, in continuous, regular and varied activities in the business of conserving his estate and protecting its income.

It would be an extraordinary construction of the Act that would result in holding that expenses incurred in isolated transactions of collecting income have to be credited in order to ascertain the amount of "income" realized, while refusing like credit of expenses of collecting income where the transactions were so continuous, regular and varied as to have all the characteristics of "carrying on business."

III.

The management of this entire great estate constituted a single "business" of the petitioner within the meaning of that word as used in Section 23 (a) of the Revenue Act of 1932.

The expenses now in question for which deduction was asked and has been disallowed, included nothing for personal compensation of the taxpayer. They were simply for a portion of the rental of his offices in New York and of the salaries of his staff of employees, and of minor expenses of his offices in New York and Paris such as stationery, telegrams and postage, etc., and some items of legal expense connected therewith, paid by him during each of the years. That they all came directly within the provisions of the Act (except for the percentage of them disallowed because attributed to the management of the petitioner's securities),

was not only conceded, but also determined by the allowance of the percentage of all these items that was held applicable to the management of the real estate.

We are brought face to face with the question whether the personal active management of his vast affairs constituted "carrying on business" by the taxpayer.

When the Act was first passed, in 1913, this taxpayer had been carrying on this business of managing his entire estate since 1889 (R. 76), and without any substantial change even in the details of the system of operation since 1902 (R. 71).

As already pointed out (*supra*, pp. 3, 4) the management of his entire properties was throughout the years carried out by his staff of salaried employees under his own constant personal supervision and direction, without discrimination between the time given day by day to real estate or securities (save only as one of the staff, Dietz, had practically to do only with real estate, and his full salary was allowed as a deduction). As to the salaries of the other members of the staff, and the office rentals and miscellaneous office expenses, these were not kept separate in any way by the taxpayer (R. 125); and the Board and the Circuit Court of Appeals made a guess that two-thirds of them pertained to the management of the real estate and one-third of them to the management of the securities, allowing the two-thirds as a deduction and disallowing the one-third.

Until the Act of 1913 was passed, Mr. Higgins' management of his entire estate as a unit was certainly a perfectly legitimate business.

When the Act provided for the deduction of the expenses of "any business" that term was certainly broad enough to

include any existing legitimate business. The mere fact that it was in existence and had been for years, brought it directly within the provisions of the Act as a recognized business.

We maintain that the taxing officers had no right or authority to split up this single business of the taxpayer into two supposedly different businesses, and determine that one part of his life work was a "business" within the Act and the other not, simply because part was expenses of management of real estate and part was management of investments in securities.

They could no more make the division of his expenses between his management of his real estate and his management of his securities than they could divide the expenses of his management of his taxable securities from those of management of his tax-exempt ones.

Watson, et al., Trustees v. *Commissioner,* 35 B. T. A. 706;
Knox as Executor, 3 B. T. A. 143.

The entirety of such a business had been distinctly recognized by the Board of Tax Appeals in *Croker* v. *Commissioner,* 27 B. T. A. 588, 592, long ago acquiesced in by the Commissioner XII-1 C. B. 4.

And from 1913 till the present proceeding got before the Board of Tax Appeals (Cf. R. 21 and R. 84) the Commissioner had annually recognized the entirety of the business of this petitioner.

IV.

The true meaning of the word "business" in this Section is that declared by this Court in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171, shortly before the passage of the Revenue Law of 1913.

We are not unmindful of the definition of "carrying on trade or business" within the meaning of Section 23 (a) recently given in the concurring opinion of Justice FRANKFURTER (joined in by Justice REED) in *Deputy* v. *Du Pont*, 308 U. S. 488, 499, to-wit,

> " 'Carrying on any trade or business,' within the contemplation of §23 (a), involves holding one's self out to others as engaged in the selling of goods or services."

If that definition excludes the business of this taxpayer it would seem to conflict with the terms of the Act, which necessarily included any and every legitimate business that was in actual existence at the time when the Act was passed.

We question, too, the accuracy of this new definition, even irrespective of the fact that this taxpayer's business of managing his entire estate was an actual going business when the 1913 Act was passed, and had been for many years prior thereto.

Undoubtedly, a great deal of business is trade. The definition suggested by Justices FRANKFURTER and REED (which does not so far appear to have been adopted by the other members of this Court), seems to us to be in substance but little more than a definition of the particular

type of business which constitutes "trade", and to import the idea of "trade" into the meaning of "business," disregarding the wider meanings of the latter word, included in the Act by the use of the word "any".

The statute, since 1918, uses both terms, clearly indicating the opinion of Congress that there were activities included in the one term that were not included in the other.

The terms of Justice FRANKFURTER's definition of "business" would have to be stretched to the breaking point to include many kinds of business familiar to us all.

Thus, personal management of the taxpayer's own holdings of real estate which is not included in any ordinary meaning of this new definition, was expressly held by this Court to be business in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 169-171.

And such management of one's own real estate has long been recognized as carrying on business within the section now under consideration.

See:

Kales v. *Commissioner*, 101 F. (2d) 35, and instances there cited on pages 37-39.

In the case at bar the Commissioner admitted, and the Board of Tax Appeals found as a fact, that this petitioner's activities in managing his own real estate were "carrying on business" (R. 84).

The Circuit Court of Appeals, in its opinion in this present case, pointed out that that question was not before it (R. 244); and affirmed the Board's orders.

Later the same Court (one different Judge sitting) held that the active management of one's own extensive holdings of improved real estate did constitute "carrying on business" within the meaning of Section 303 (e) of the Revenue Act, expressly differentiating its later ruling from its own earlier ruling in the case at bar, on the ground that its decision in the case at bar did not pass on the management of the petitioner's real estate. That Court in that later case made no suggestion that the term "carrying on business" could be given a different meaning in Section 303(e) from that which it bore in Section 23(a) of the Act.

Pinchot v. *Commissioner,* 113 F. (2d) 718, 719.

It would certainly be difficult to bring such activities within the terms of "holding one's self out to others as engaged in the selling of *goods* or *services.*"

Was not Eli Whitney engaged in business all the years he was struggling to perfect the cotton-gin, even though he sold neither services nor goods, and had neither goods nor services to offer to sell?

Was not the clearing of the farms of New England and of the Ohio Valley by the original settlers for their own use, a huge piece of "business", of which this generation has inherited the benefits?

One who engages in prospecting, for oil for instance, has neither goods nor services to sell or offer to sell, until and unless he "strikes oil." Is he not engaged in "business" before that happy event?

How about the great Fire and Marine Insurance Corporations? They certainly are, in the common speech of

men, engaged in "business", but it would involve an inordinate stretch of the words to say that they are "holding themselves out to others as engaged in the selling of goods or services."

Other suggestions will readily occur.

All such activities would come directly within the definition of "business" adopted by this Court in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, in construing the Corporation Tax Act, two years before Congress used that term in the Revenue Act of 1913, the predecessor of the 1932 Act.

This Court then said:

> "It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158 citing People ex rel. Hoyt v. Tax Comrs., 23 N. Y. 242, 244. 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit' 1 Bouvier's Law Dict. p. 272."
>
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171.

We respectfully submit that in passing the Revenue Act of 1913 Congress should be deemed to have used the term "any business" in the sense so declared by this Court without a dissent but two years before.

In the very recent *Pinchot* case the Circuit Court of Appeals for the Second Circuit cites that definition in *Flint* v. *Stone Tracy Co.* as the basis for its decision that Mr. Pinchot's testatrix had been engaged in "business".

Pinchot v. *Commissioner*, 113 F. (2d) 718, 719.

And in the still more recent case of *Pyne* v. *The United States* (35 Fed. Suppt. 81), the Court of Claims harked back to that definition in *Flint* v. *Stone Tracy Co.* as the correct one.

We may go a step further.

The Revenue Act of 1913 provided for the deduction of "the necessary expenses actually paid in carrying on any business" (Revenue Act of 1913, Sec. B II. See Appendix).

And that provision has never been dropped in any of the many re-enactments of the Revenue Act, despite the constantly repeated rulings of both the administrative officers, the Board of Tax Appeals and the Courts, giving the words "any business" a far wider meaning than that given in Justice FRANKFURTER's concurring opinion.

See cases cited *supra,* page 22.

The Commissioner from 1914 to 1932 recognized the entire activities of this particular taxpayer as a single entire business and allowed deduction of all its expenses.

Without multiplying other instances, in August, 1933, the Commissioner made the formal ruling:

> "You are advised that the Bureau has recently* adopted the policy of allowing as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection and handling of properties producing income."
>
> *Kales* v. *Commissioner,* 101 F. (2d) 35, 39.

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* *Note*—as to the words "recently adopted" in this statement see *infra* page 58.

The Commissioner did not advance this theory of the divisibility of the expenses between management of real estate and management of securities until this present case got before the Board of Tax Appeals and his earlier theory of apportionment between taxable and tax-exempt securities was abandoned (R. 84).

The Board of Tax Appeals in at least two earlier cases had statedly adopted the definition of the word "business" in *Flint* v. *Stone Tracy Co.* as the proper one in construing the sections of the Income Tax Act using the word.

Eysenbach v. *Commissioner,* 10 B. T. A. 716;
Baker v. *Commissioner,* 17 B. T. A. 733, 737.

And in numerous decisions of the Courts that definition has been adopted in construing various provisions of the Revenue Act.

Crooks v. *Kansas City Ass'n.,* 37 F. (2d) 83;
Rogers v. *United States,* 41 F. (2d) 868;
Sears Roebuck & Co. Ass'n v. *Commissioner,* 45 F. (2d) 506, 508;
Sloan v. *Commissioner,* 63 F. (2d) 666, 669;
Chaloner v. *Helvering,* 69 F. (2d) 571;
Pinchot v. *Commissioner,* 113 F. (2d) 718;
Pyne v. *United States,* 35 Fed. Suppt. 81, 84.

This Section of the Revenue Act of 1913 was amended in some other respects by the Revenue Act of 1916, and in turn in 1918 (Sec. 214 (a) of the Revenue Act of 1918), to substantially its 1932 form, the words "trade or" being inserted in 1918 between the words "any" and "business." And since 1918 the section has been re-enacted without

substantial change in 1921, 1924, 1926, 1928, 1932, 1934, 1936 and 1938. (See Appendix.) But throughout every such change the provision for deduction of the expenses of "any business" had been retained up to and including 1932; and since 1932 has been retained throughout the later re-enactments of the Revenue Act.

Those re-enactments of the Act without substantial change are persuasive of legislative recognition and approval of the construction theretofore given to the term "any business."

Helvering v. *Winmill*, 305 U. S. 79, 83;
Helvering v. *Bliss*, 293 U. S. 144;
Kales v. *Commissioner*, 101 F. (2d) 35, 38-39.

That the management of the whole of this great estate by the taxpayer was a "business" within the definition in *Flint* v. *Stone Tracy Co.* can scarcely be gainsaid.

This taxpayer's activities met every feature of that definition.

Some added inference as to the intention of Congress in using the word "business" in the original 1913 Revenue Act may perhaps be gleaned from the context of the Act.

Section II B began with the following statement:

> "That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce or sales or dealings in property whether real or personal, growing out of

> the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities or the transaction of any lawful business carried on for gain or profit, or gains or profits, and income derived from any source whatever including the income from but not the value of property acquired by gift, bequest, devise or descent."

After a proviso concerning the proceeds of life insurance policies, that Section went on:

> "That in computing net income for the purpose of the normal tax, there shall be allowed as deductions: First, the necessary expenses actually paid in carrying on any business, not including personal, living or family expenses."

The words "any business" in the clause allowing deductions would seem to be correlative to the previous provisions, and certainly to include what is described in Section II B as the "transaction of any lawful business carried on for gain or profit"; and the exclusion of "personal, living or family expenses" would seem to mark clearly the intention of Congress in using the words "any business" in that original Act, and its intention to allow as deductions all other expenses incurred in "any lawful business."

What the Congress intended to exclude from such deductions was specified by it as "personal, living or family expenses." Any other expenses of "any lawful business" were to be allowed as a deduction and, as we point out below, *infra*, under Point VII, any legitimate business that was actually being carried on when the 1913 Act was adopted was recognized by that Act as one the expenses of which should be allowed as a deduction.

V.

Section 23(a) itself distinguishes between expense incurred in the course of isolated transactions, and lik expenses incurred in the usual course of the regula conduct of a business.

In its opinion in this case the Board of Tax Appeal said:

> "To allow the deductions claimed in the preser proceeding and to disallow them as was done i Kane v. Commissioner, *supra*, would be to make distinction between the small investor and one i vesting like the petitioner upon a very large scal for the nature of the expenses disallowed by th Commissioner obviously is the same in both case We cannot make distinction merely because of th extent of investments or of expenses commensura therewith" (R. 83).

It seems to us that this statement involves a certai confusion of thought on the part of the Board. It faile to observe that the Act itself specifically recognized difference between expenses of isolated semi-occasion transactions, and expenses of the same kind incurred "carrying on business."

The Board's comment is thus not one of constructi of the Act, but one of criticism of its express provision.

A man who holds a single $10,000 coupon bond, wh twice a year cuts his one coupon and deposits it in ba to his own credit, in each of those two brief acts is co ducting a business transaction; but he clearly is not "carr

ing on business'' in so doing. The elements of continuity, constant repetition, regularity and extent, long recognized in the decisions as involved in the statutory expression ''carrying on business,'' are completely lacking.

But where the securities involved run to many millions and the watching of maturities of coupons and other interest payments, and the promptness of payment, watching the attendant questions of the varying values of the securities, and the wisdom of retention or sale (R. 159-160), require, because of their number and constant occurrence, constant attention from a number of employees besides the taxpayer himself, it then does amount to ''carrying on business''; and when the expense of doing so as to the securities owned runs (according to the decision below) from $16,000 to $20,000 each year, occupying one-third of the entire time of four employees, besides practically daily attention from the taxpayer himself, it is quite obvious that the activities have the qualities, the continuity, the regularity, the variety and the extent which constitute ''carrying on business'' as opposed to mere isolated transactions.

The distinction provided by this clause of the statute does not depend upon the nature of the particular act performed, as the Board of Tax Appeals inferred, but on the continued recurrence of such acts and the constant and regular attention and labor required. It is this continuity of required attention and labor that characterizes the series of acts as ''carrying on business,'' when a few isolated transactions a year of identical character would not be such.

Kales v. *Commissioner*, 101 F. (2d) 35, 37;
Miller v. *Commissioner*, 102 F. (2d) 479.

The same idea was expressed in different form by the Circuit Court of Appeals for the First Circuit when it said:

> "Maintenance of an office for this purpose, though not conclusive, is significant."
>
> *Foss* v. *Commissioner*, 75 F. (2d) 326, 328.

VI.

The Act contains no suggestion that continuous and regular transactions in the management of a large amount of securities, which when performed by one to whom that business was farmed out would be business, the expenses of which the farmer would be entitled to deduct from his own income, shall cease to be business when conducted by the owner of the securities, for his own profit.

The handling of a vast amount of securities, watching whether the income is promptly paid, collecting and accounting for principal and income, even aside from attending to questions of reinvestment, is a recognized form of business, conducted frequently by Trust Companies and Banks, for which conduct of such business for others, they make well known charges.

When farmed out to a third person, his management of a stranger's property, even though confined to the management of securities, would clearly be "carrying on busi

ness,'' and this farmer's own necessary and ordinary expenses in carrying on that business would clearly be allowable as a deduction from his own private income from the job.

Is it any the less ''carrying on business'' simply because the owner of the securities actively attends to it himself for his own profit, instead of farming it out to a third person at greater expense.

Where in the Act can be found any provision or any justification for a ruling that such business shall cease to be considered ''any business'' if it is conducted by the owner of the securities in person, with the assistance of a staff of salaried employees?

The words, ''any business'' contradict any such differentiation. The new theory that if the owner of securities conducts that business himself, it ceases to be business, will not bear analysis in the face of the express words of the Act.

The Act does not authorize a differentiation between those carrying on a business for others, and those carrying on a business for themselves.

Whether transactions amount to ''carrying on business'' is not to be determined by who conducts it.

VII.

Where a single business is conducted by the taxpayer as an entirety involving large ordinary and necessary expenses for rental of offices and salaries of assistants necessary to the operation of that business, nothing in the Act authorizes either the Commissioner, or the Board of Tax Appeals, or the Courts, to sever those expenses and say that a percentage thereof shall be disallowed as a deduction because a corresponding percentage of the business, regularly conducted by the taxpayer for forty years, consists of the management of his securities and reinvestment thereof and the collection of the income therefrom.

The theory adopted below seems to involve reading into the statute a clause providing that one who owns both securities and large holdings of productive real estate, may not carry on the business of managing his own properties.

The statute on the contrary expressly allows him to take the deduction of the ordinary and necessary expenses incurred or paid during the taxable year in carrying on "any business."

There was nothing illegitimate in carrying on such a business as the taxpayer had been conducting since 1889 (R. 76), even the routine whereof had been unchanged since 1902 (R. 71), ten years before the Income Tax Amendment to the Constitution was adopted.

There is nothing in any of the series of Revenue Acts that says he may not continue to carry on that business,

begun years before their enactment. In fact Section II, B of the 1913 Revenue Act, from which the section under consideration takes its rise, imposed the tax on gains from "any lawful business carried on for gain or profit". That certainly was not a prohibition of any lawful business then and for many previous years carried on by this petitioner or by any one else.

Concededly expenses of a business cannot be apportioned and partly disallowed because part of the income of the business is derived from tax-exempt securities.

Watson, et al., Trustees v. *Commissioner*, 35 B. T. A. 706;
Knox as Executor, 3 B. T. A. 143.

That ruling was not only acquiesced in by the Commissioner as late as 1937, 1 C. B. 27, but expressly recognized by the Board in its opinion in the case at bar (R. 84).

Where a business is being regularly conducted by a taxpayer, all the ordinary and necessary expenses thereof are by the express terms of the Statute deductible.

In the present case the taxpayer was admittedly carrying on business. The business he was conducting was and for forty years had been, actually, the management of his entire estate. Can part of the expenses of that business be disallowed on the questioned theory adopted below, that if the management of his own securities had been conducted by him separately it would not have been a business, despite having every other characteristic of a regularly conducted business?

In *Croker* v. *Commissioner*, 27 B. T. A. 588, the Board of Tax Appeals held such a business an entirety, saying:

> "The petitioner had, together with her husband, appointed McDonald to act as her agent in the sale of valuable real estate in Florida and for the purpose of collecting interest upon bonds and notes. The sale and care of this property and of her investments in Florida constituted her business." (27 B. T. A. 588, 592.)

And this ruling was "acquiesced" in by the Commissioner in 1933. XII-1, C. B. 4.

The expenses disallowed, as to which we have appealed were part of the ordinary and necessary expenses of the legitimate business carried on by the taxpayer, paid during the taxable year; and being such were improperly disallowed as a deduction, contrary to the express provision of the Act, that in computing net income there should be allowed as a deduction "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

Though the decision below seeks to separate the taxpayer's business into different branches, he himself has never done so, and the Act provides for deduction of all the ordinary and necessary expenses of the business he is carrying on.

This attempted present severance of this taxpayer's business involves another difficulty. If the business is severable now, it was equally severable before the original Act was passed. And if that is the case, then the business

of managing his own securities carried on by him as a regular business before and when the 1913 Act was passed, was itself a business described in the original Act, when it said "any business."

Recognition of the management of one's own securities, if possessing the other qualities of constant activity, etc., as one of the kinds of business included in the terms of the original Act of 1913, is a necessary corollary of this theory of present severability.

VIII.

The ordinary and popular meaning of the term "any trade or business" is broad enough to include the management of one's own securities if that management involves the elements of constant attention and care instead of mere sporadic transactions.

When we consult the lexicographers, we find a great variety of meanings given to the word "business." In some of them, as a subordinate definition, we find the word "trade." In the Oxford Dictionary it is in the twenty-first definition of "business." As indicated by its lowly position among the many definitions of "business," trade is but a particular type of "business," the latter being a word of much broader import, especially when preceded by the word "any."

Correlatively, we find in the Century Dictionary a definition of "trade" as "the business of buying and selling";

implying directly that there are other kinds of "business" than buying and selling.

As this Court said, years ago,

> "'Business' is a very comprehensive term and embraces everything about which a person can be employed."
>
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 170, 171.

And the law lexicographers have long given it that meaning in slightly varying forms.

Today the word is commonly used in ordinary speech, as characterizing something distinguished from pleasure or social activities, as a man goes on a "business" trip, or on a social or pleasure trip. That marks the ordinary definition of the word, and concurs with the definition in *Flint* v. *Stone Tracy Co.*

In this particular section of the statute, there are two specific features indicating that the word is not used in the statute in that narrow sense of "trade."

First, the word "any" gives the term its broad meaning, and not its most limited one.

Second, the addition in 1938 of the words "*trade or*" between "any" and "business," shows conclusively that something else was intended by the word "business" than "trade."

In addition to these features is the fact that for twenty years after the enactment of the statute no such limited meaning of the words "carrying on business" was advanced either by the Revenue Department or the Court.

IX.

The history of the legislation and its administration strongly support the construction of the statutory provision concerning the deduction, for which we contend.

The phrase "engaged in business," as used in the Corporation Tax law of 1909, was construed by this court in 1911, in terms that clearly covered the activities of the taxpayer here.

This definition was given just about two years before the adoption of the Revenue Act of 1913, by which the allowance of a deduction of the expenses of his carrying on "any business" was allowed to the taxpayer. And the successive income tax Acts of Congress have constantly, in substance, retained the provisions for this deduction.

From 1913 on until 1934 the deduction of a taxpayer's expenses of actively managing his own fortune, whether invested in securities or lands, or in both was allowed by the Commissioner and by the Board of Tax Appeals in repeated cases.

(1920) O. D. 537, 2 C. B. 175;
(1921) O. D. 877, 4 C. B. 123;
(1929) *Kissel* v. *Commissioner*, 15 B. T. A. 1270, Acquiesced in VIII-2 C. B. 28;
(1929) *Ostenberg* v. *Commissioner*, 17 B. T. A. 738, 746;
(1933) *Croker* v. *Commissioner*, 27 B. T. A. 588, 592, Acquiesced in XII-1 C. B. 4;

(1932) *Bachofen-Von Echt* v. *Commissioner,* 27 B. T. A. 1419 (See 101 F. [2d] 39) reversing its prior decision in *Von Echt* v. *Commissioner,* 21 B. T. A. 702, decided in 1930;
(1934) I. T. 2751, XIII-1 C. B. 43.

The reversal of the *Bachofen-Von Echt* 1930 decision by the Board itself in 1932, led to a reexamination of the question by the Bureau, and in 1934, in a formal reply to the Committee of Banking Institutions on Taxation, the Revenue Bureau stated:

> "You are advised that the Bureau has recently adopted the policy of allowing as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection and handling of properties producing taxable income."
>
> 1934 C. C. H. Federal Tax Service Vol. 3, Sec. 6035, (p. 8027).

The words "recently adopted" refer to this reexamination and to its *readoption* of what had been the Bureau's steady policy since 1913, and not to any actual change of its long-standing policy, but only to a mooted one.

Other decisions allowing expenses of the business of management by the owner of his funds invested in securities are:

Alverson v. *Commissioner,* 35 B. T. A. 482, 488, Acquiesced in in 1937-1 C. B. 1;
Barney v. *Commissioner,* 36 B. T. A. 446, Acquiesced in in 1939-1 (Part I) C. B. 3;
Roebling v. *Commissioner,* 37 B. T. A. 82, 87-89;
Kenan v. *Bowers,* 48 F. (2d) 263, 266.

Moreover, from 1913 to 1932, this particular taxpayer had always claimed and been allowed, without controversy, to make the deduction from his gross taxable income of the entire expenses of the offices and staff maintained by him for the management of his estate, as expenses of a "business" carried on by him. (Unpublished. See Department Records.)

In *Croker* v. *Commissioner*, 27 B. T. A. 588, 592, the combination of the management of the owner's real estate and collection of interest on bonds and notes belonging to her, was specifically recognized as constituting her "business." And this decision was later "acquiesced" in by the Commission XII-1 C. B. 4.

The Board of Tax Appeals in at least three earlier decisions had expressly held that the definition given by this Court of "business" in *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, was the proper definition of the word where used in the Income Tax Act.

(1928) *Eysenbach* v. *Commissioner*, 10 B. T. A. 716, Acquiesced in, VII-2 C. B. 12;
(1929) *Elliott* v. *Commissioner*, 15 B. T. A. 494, Acquiesced in, VIII-2 C. B. 15;
(1929) *Baker* v. *Commissioner*, 17 B. T. A. 733, 737.

Similar decisions in the Courts prior to the 1932 reenactment of the Revenue Law were:

Wilson v. *Eisner*, 282 F. 38, 41;
Deering v. *Blair*, 23 F. (2d) 975, 976;
Washburn v. *Commissioner*, 51 F. (2d) 949, 952.

We fail to find any contrary decisions prior to that reenactment.

The Act was re-enacted in 1932, subsequent to all these decisions, without a suggestion from Congress that this construction of the word "business" had been erroneous.

The long-continued rulings of the Revenue Department, of the Board of Tax Appeals and the Courts, year after year for over fifteen years before the years here involved, during which the statute had been re-enacted without substantial change in this respect, in 1916, 1918, 1921 and 1932, makes applicable the doctrine:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received Congressional approval and have the effect of law."
>
> *Helvering* v. *Winmill,* 305 U. S. 79, 83.

And departmental rulings are adequate proof of the administrative practice.

> *Helvering* v. *Bliss,* 293 U. S. 144, 151;
> *McFeely* v. *Commissioner,* 296 U. S. 102, 108.

And this doctrine has been held applicable to this particular clause:

> "A recognized rule of statutory construction that the re-enactment of a statute by Congress in identical terms and failure to amend it in the face of consistent judicial and administrative construction is persuasive of a legislative recognition and approval of the statute as thus construed. Brewster v. Gage, 280 U. S. 327, Helvering v. Bliss, 293 U. S. 144, 151."
>
> *Kales* v. *Commissioner,* 101 F. (2d) 35.

This rule receives perhaps some added emphasis in the present case, because the same provision as to deductions of expenses paid in carrying on business has, since 1932, been re-enacted without material change in 1934, 1936 and 1938 (See Appendix), with repeated rulings meantime by the Courts applying the definition of "business" in the *Stone-Tracy* case to the section here involved.

Cecil v. *Commissioner,* 100 F. (2d) 896;
Kales v. *Commissioner,* 101 F. (2d) 35;
Wallace's Estate v. *Commissioner,* 101 F. (2d) 604,
Miller v. *Commissioner,* 102 F. (2d) 476, 479.

The decision of the Circuit Court of Appeals in the case at bar disregards this familiar rule.

We have not been able to find any opinion prior to the one at bar that repudiates the definition given to the word "business" in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 171, save the concurring opinion of Justices FRANKFURTER and REED in *Deputy* v. *Du Pont* (308 U. S. 488).

The constant re-enactment of this provision during more than a quarter of a century while this definition of the word "business" was maintained, is persuasive that the word "business" has been used by Congress in this Act in the sense declared by this Court in *Flint* v. *Stone-Tracy Co.* (220 U. S. 107, 171) to be the meaning of that word.

X.

The decision of the Circuit Court of Appeals should be reversed, and the deductions claimed of $20,270.89 for the year 1932 and of $16,087.44 for the year 1933 allowed.

Respectfully submitted,

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APPENDIX

Evolution of Section 23, Subdivision (a) of the Revenue Act of 1932.

REVENUE ACT OF 1913, c. 16
38 Stat. 167

DEDUCTIONS

Section II B—"That in computing net income for the purpose of the normal tax there shall be allowed as deductions:

"First, the necessary expenses actually paid in carrying on any business, not including personal, living, or family expenses;"

REVENUE ACT OF 1916, c. 463
39 Stat. 759

DEDUCTIONS ALLOWED

"Sec. 5. That in computing net income in the case of a citizen or resident of the United States—

"(a) For the purpose of the tax there shall be allowed as deductions—

"First. The necessary expenses actually paid in carrying on any business or trade, not including personal, living, or family expenses."

REVENUE ACT OF 1918, LAWS 1919, C. 18
40 Stat. 1066

DEDUCTIONS ALLOWED

"Sec. 214. (a) That in computing net income there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;"

REVENUE ACT OF 1921, C. 136
42 Stat. 239

DEDUCTIONS ALLOWED INDIVIDUALS

"Sec. 214. (a) That in computing net income there shall be allowed as deductions:

"(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in

the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity;"

REVENUE ACT OF 1924, c. 234
43 Stat. 269

Sec. 214(a) identical with Section 214(a) of 1921 Act.

REVENUE ACT OF 1926, c. 27
44 Stat. 26

Sec. 214(a) identical with Section 214(a) of 1921 Act.

REVENUE ACT OF 1928 c. 852
45 Stat. 799

"§23. DEDUCTIONS FROM GROSS INCOME

"In computing net income there shall be allowed as deductions:

"(a) EXPENSES. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from

home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

REVENUE ACT OF 1932, c. 209
47 Stat. 179

Sec. 23(a) identical with Section 23(a) of 1928 Act. (See pp. 11-12, *supra*).

Later Re-enactments.

REVENUE ACT OF 1934, c. 277.
48 Stat. 688

Sec. 23(a) identical with Section 23(a) of 1928 Act.

REVENUE ACT OF 1936, c. 690.
49 Stat. 1658

Sec. 23(a) identical with Sec. 23(a) of 1928 Act.

REVENUE ACT OF 1938, c. 289.
52 Stat. 460

"Sec. 23. DEDUCTIONS FROM GROSS INCOME

"In computing net income there shall be allowed as deductions:

"(a) EXPENSES. (1) IN GENERAL—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

REVENUE ACT OF 1940

The Revenue Act of 1940 amended only certain Sections of the Revenue Act of 1938. It made no reference to the Section here involved, leaving it untouched as it stood in the 1938 Act.